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In The

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, et al.,

Petitioners,

v.

BRENDA ROE and ANNA DOE,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a state statute that discriminates against newcomer state citizens so as to deny them the same level of public assistance as that received by other state citizens, based solely on their recent arrival and states of prior residence, violates the Equal Protection Clause, Citizenship Clause, and Privileges or Immunities Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, and the logic and structure of our constitutional scheme?

2. Whether a state statute enacted principally for the purpose of deterring needy families from migrating to and settling in the state is constitutionally permissible?

3. Whether Congress may authorize a state statute that discriminates against newcomer state citizens based on their length of residency and states of prior residence, and that has the purpose of deterring needy families from migrating to and settling in the state?

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STATEMENT OF THE CASE

A. The California Statute

The California durational residency statute, Welfare and Institutions Code §11450.03, facially discriminates against newcomer residents by restricting their maximum CalWORKs assistance to the level of their prior state of residence.[1] Section 11450.03 is the same statutory provision invalidated in *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom., Anderson v. Green*, 513 U.S. 557 (1995). The statute mandates that eligible families who have resided in the state for less than twelve consecutive months immediately before applying cannot receive CalWORKs assistance any higher than "the maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code §11450.03(a).

Under this statute, Californians who have resided in the state for at least one year receive CalWORKs assistance at the level the State of California has deemed appropriate to their subsistence requirements. In contrast, Californians who have lived in the state for less than one year – even though no less bona fide California residents – are limited to the lesser assistance levels they would have received in

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[1] CalWORKs is the program adopted by the California Legislature, Cal. Welf. & Inst. Code §11200 *et seq.*, after Congress' replacement of Aid to Families with Dependent Children ("AFDC") with a new program named Temporary Assistance to Needy Families ("TANF"), under the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). The PRWORA amended the Social Security Act, 42 U.S.C. §601 *et seq.*, to replace AFDC with TANF and require each state to submit a TANF plan. CalWORKs is both work-based and time-limited, requiring participation in work activities while receiving aid, Cal. Welf. & Inst. Code §11320.1, and discontinuing aid after 60 months. *Id.*, §11320.15.

Oklahoma, Mississippi, or whatever other state from which they moved, if that state's assistance level is lower.[2]

The California law thus creates a multi-tiered benefits scheme, under which many families that have migrated from other states within the past year will receive a small fraction – as little as 21% – of that received by otherwise identical families. J.A. 26, 75. For example, while the maximum aid for a family of four in California is $673 (J.A. 75), a family of four that has moved from Mississippi to California within the past year would receive only $144 per month (J.A. 26), regardless of whether that family could survive at that level in California, which has one of the highest costs of living in the United States. J.A. 91-97.

Although the impact on families is large, the impact on the State's public assistance budget is minuscule. By the State's own estimate, the cost savings from section 11450.03 amount to 0.38% of the total AFDC budget.[3] The State's own estimate also reveals that **less than one percent** of families receiving benefits at any given time have migrated from another state within the past year

[2] Newcomer families from states with assistance levels lower than California's thus receive the lower amount of the states from which they came, while newcomer families from states with higher assistance levels receive benefits at the lower California levels. Newcomer families from foreign countries receive assistance at the same levels as California residents who have lived in the state for a year or longer. *Roe v. Anderson*, 966 F. Supp. 977, 980 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

[3] According to the State Deputy Director of the Welfare Programs Division ("WPD"), the cost savings to California's AFDC program arising from section 11450.03 are only $22.8 million, out of a total AFDC budget of $6 billion. Pet. App. 36-37.

– and the percentage who have migrated from states with **lower** welfare benefits is necessarily even less than that.[4]

California's durational residency requirement applies without regard to a family's actual reason for migrating to California. It makes no difference to the calculation of assistance levels whether the recipient is, for example:

- a mother returning to California with her small children to escape domestic violence in Louisiana or Oklahoma, as was the case of plaintiffs in *Green*, 811 F. Supp. at 517: *see also* J.A. 100-05, 145-49,
- a single parent who has never before received public assistance, who moved to California to take a new job within the past year and then,

[4] While the State Deputy Director of the WPD estimates that approximately 9100 families receiving aid as of October 1995 had resided in another state within the past year, Pet. App. 37, his declaration conspicuously omits any estimate of the **total** number of families receiving aid. However, the total number of families receiving aid as of July 1996 was 952,351. J.A. 75. Accordingly, less than 1% of all families receiving aid had migrated to California during the past year – and an even smaller proportion would be affected by § 11450.03, which only affects families migrating from states with **lower** benefit levels.

Although the State had, in 1992, estimated that "[a]pproximately 7% (50,000 cases) of California's AFDC caseload lived in another state within the previous twelve months prior to their application for aid in this State," J.A. 48, this figure does **not** purport to estimate the percentage of the caseload actually affected by § 11450.03 at any given time. In particular, the 7% estimate appears to include every family that resided out of state in the 12 months "**prior to their application**" for aid, rather than those who had resided in the State during the 12 months prior to the 1992 survey. Thus, while 7% of the entire caseload may have resided out of state at some point during the 12 months prior to their applying for aid, a far smaller percentage are affected by §11450.03 at any particular time. In addition, the 7% estimate includes people who came from states with higher benefits than California's, and would therefore be eligible for the full California benefit.

at any time within the twelve months, lost that job due to a plant closure or other unforeseen circumstance, or

- a member of a family, like that of the named plaintiffs in this case, that migrates to California in search of employment without knowing a thing about CalWORKS or TANF, and is forced to apply for assistance when not immediately able to find work.

Under the Ninth Circuit's decision in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), California had been prevented from implementing its durational residency scheme. After enactment of the 1996 federal welfare law, 42 U.S.C. §604(c), and without any further action on the part of the state legislature, state officials decided to proceed anew with implementation of section 11450.03. In February 1997, California directed counties to implement section 11450.03 effective April 1997. J.A. 20-25.

1. The Purpose of the Statute

Based on the plain language of the law, its legislative history, and Petitioners' own representations, the district court and the court of appeals both concluded that "the apparent purpose of §11450.03 was to deter migration of poor people to California." *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998); *see Green*, 811 F. Supp. at 522 n.14. As the court of appeals noted: "At oral argument . . . , in response to the suggestion that the purpose of §11450.03 is to keep poor people out of the state, the state conceded that it does not want people to move to California 'with a mind-set of economic dependency.' " 134 F.3d at 1404; *see also Beno v. Shalala*, 30 F.3d at 1061 (stating that section 11450.03's residency requirement "aims to discourage poor families from moving to California").

a. Legislative history

The statute has its origins in a ballot initiative, Proposition 165, first introduced by Governor Pete Wilson on December 10, 1991. This measure contained language virtually identical to that ultimately enacted as Welfare and Institutions Code §11450.03, limiting "families who have resided in this state for less than twelve (12) months . . . [to] an amount . . . not to exceed the maximum aid payment that could have been received from the state of prior residence." J.A. 19.[5] Proponents of the measure described its objective as to "**STOP** out of state welfare recipients from moving to California just to increase their grants." J.A. 28 (emphasis in original).

Campaign materials favoring the ballot measure proclaimed the same purpose. For example, a widely distributed "fact sheet" stated that the proposition "*LIMITS WELFARE PAYMENTS TO NEWCOMERS* – To reduce any incentive to come to California solely for higher welfare benefits." J.A. 31. In the official ballot argument on behalf of the measure, Governor Wilson articulated as the initiative's selling point that "people move to California to collect welfare," and that "[n]ew state residents would receive no more in welfare here than in their home state, to end California's status as a welfare magnet." J.A. 34.

At the same time that the Governor sought voter approval for the initiative, he promoted identical legislation. The State Legislative Analyst's report on the measure stated that "[t]he concern driving these policy proposals is that people receiving assistance in low-benefit states are encouraged to move to high-benefit states in order to take advantage of the higher benefit." J.A. 51. Both opponents

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[5] The legislative history of predecessor bills is appropriately considered to ascertain the legislative intent of a subsequent enactment. *See Estate of Cowart v. Nicholas Drilling*, 505 U.S. 469, 478 (1992).

and proponents of the legislation emphasized this purpose throughout the legislative debate.[6] Although the ballot initiative was defeated at the polls, its legislative counterpart was subsequently adopted and signed by the Governor on September 14, 1992. Cal. Stats. 1992, Ch. 10 West's Cal. Leg. Serv. 2897 (1992).

b. The federal waiver application

The Secretary for the California Health and Welfare Agency requested then-required waivers from the federal government for both Proposition 165 and the companion legislation. J.A. 43-49. The waiver request letters for each expressly identified the sole objective of the residency requirement as "reduc[ing] the incentive for families to migrate to California for the purpose of obtaining higher aid payments." *Green*, 811 F. Supp. at 522 n.14; J.A. 45.

While the State now claims cost-savings as its rationale for imposing the durational residency requirement, the undisputed record showed that California could have accomplished exactly the same claimed savings simply by

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[6] *See, e.g.*, J.A. 64 (remarks of Assemblyman Bates):

> This Bill sends a message that says if you're poor, [you're] down trodden, California doesn't want you. We don't want you to come here, we want you to go someplace else, the land of opportunity is not a land of opportunity for people who are poor.

J.A. 71 (remarks of Assemblyman Gotch):

> It's certainly debateable [sic] whether the westward migration is in fact fueled by California as a welfare magnet. I doubt that's the case but none the less the passage of this Bill would certainly lay to rest that question and I would urge an aye vote on the Bill before us today.

See also Green J.A. 93 (statement by Petitioner Anderson, Director of Department of Social Services, that intent of the statute was to "discourag[e] people from coming to California just for higher benefits").

reducing benefits across-the-board by but 72 cents per recipient per month. Pet. App. 36-37 ($22.8 million divided by 12 months, divided by 2,645,814 recipients); *see also Roe*, 966 F. Supp. at 985 (finding that "the State may save a comparable amount of money by a very minor reduction in the benefits paid to all AFDC recipients").

2. The Impact of the Statute

a. Plaintiffs

The named plaintiffs in this litigation each moved to California for reasons entirely unrelated to the receipt of welfare benefits; rather, each moved to pursue employment. *Roe*, 966 F. Supp. at 980. Brenda Roe, pregnant with her first child at the time of the preliminary injunction, had never previously sought public assistance in any state. She lacked any awareness of CalWORKS, TANF or AFDC when she and her husband decided to leave Oklahoma and settle in California. J.A. 106. The median monthly average rents in Long Beach, California, where she resides, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. J.A. 108. She was informed by the State Social Services office that she would be limited to the Oklahoma monthly grant level of $307, as compared to the California grant level of $565 for a family of three. *Id.*; *Roe*, 966 F. Supp. at 980. "Both of the named plaintiffs have been unable to locate housing in California that they could afford on the reduced grant." *Id.* at 985.

b. Effect on new Californians

The undisputed evidence showed that "although in absolute terms California benefit levels rank as the sixth highest grant level in the United States," "when housing costs are factored in, California benefit payments rank 18th in the nation." *Roe*, 966 F. Supp. at 981. The district court noted that "defendants do not disagree with plaintiffs' contention that there will be disparities, even significant disparities, among California AFDC recipients as between

newcomers and recipients who have resided in the state for one year." *Id.* at 982-83.

Indeed, the State did not contest expert testimony that in nearly all cases the amount that newcomers would receive falls far short of what is required to subsist – or even to pay rent – in California. J.A. 91-97. In all but two of the states where the maximum aid payment is lower than California's, the cost of living is also below that of California, in many cases well below. *Roe*, 966 F. Supp. at 981 n.10, *see also* J.A. 94. There are 15 states in which the maximum benefit for a family of three was less than half the fair market rent for even a one-bedroom apartment in California. *Roe*, 966 F. Supp. at 981 n.10. And, to compound these disparities, California recipients are far less likely to receive governmental housing assistance than are recipients in other states. In 1995, for instance, only 9% of California AFDC families received governmental housing assistance, less than half the national average. J.A. 94.

The State submitted no evidence in support of its "welfare magnet" hypothesis. Instead, all of the evidence before the district court demonstrated that "persons do not move from state to state to seek higher AFDC benefits." *Roe*, 966 F. Supp. at 982. The uncontroverted record showed, for example, that "non AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people," and that "when the indigent relocate, they have *no greater propensity* to consume welfare benefits than the poor who are already within a state's borders." *Id.* (original emphasis).[7] The State's own Legislative Analyst has acknowledged that available evidence indicates that "there are many reasons for moving" and

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[7] The district court relied in part on a recent study finding "that only 3.8 percent of the AFDC-eligible population moved from one state to another, and only 1.8 percent moved from a state offering lower to a state offer[ing] higher AFDC benefits. In contrast, out of AFDC non-eligible people, 6.8 percent moved to a different state, 3.4 percent from a lower to a higher benefit state." *Id.* at 982 n.13 (brackets in original).

that "reduced grants for new arrivals may not appreciably reduce migration for those families and individuals that end up on public assistance." J.A. 60-61.

B. Proceedings Below

The district court granted a preliminary injunction against enforcement of the durational residency statute, holding that it impermissibly impaired the fundamental constitutional right of interstate migration and, alternatively, that it irrationally discriminated based on length of California residency in violation of the Equal Protection Clause. *Roe*, 966 F. Supp. at 983-85 (adopting analysis of "Supreme Court's right of migration and equal protection cases" set forth in *Green*, 811 F. Supp. 516). The court of appeals affirmed the preliminary injunction, concluding that the district court did not err in its determination that Plaintiffs had demonstrated a probability of success on the merits. *Roe*, 134 F.3d at 1404 (citing *Green*, 26 F.3d 95, 96 (9th Cir. 1994)). In particular, the court of appeals reaffirmed that the durational residency requirement violated the Equal Protection Clause by drawing "distinctions . . . among residents of a state . . . based on the incipiency or duration of their residency." 134 F.3d at 1404. The court of appeals also upheld the district court's determination that this durational residency requirement was predicated upon the impermissible purpose of "deter[ring] migration of poor people to California." *Id.*

SUMMARY OF ARGUMENT

One of the cornerstones of our constitutional structure is the principle of free interstate migration, under which United States citizens may become citizens of their state of choice by establishing residence therein, and may thereby enjoy the same rights as other citizens of that state. This Court has consistently reaffirmed that this principle forbids not only "actual barriers to interstate migration" but also " 'being treated differently' " on account of one's recent migration from another state. *Bray v. Alexandria*

Women's Health Clinic, 506 U.S. 263, 277 (1993) (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)). While states are free to implement rules designed to determine whether new arrivals are indeed bona fide residents who "inten[d] to remain in the State," *Sosna v. Iowa*, 419 U.S. 393, 407 (1975), they may not deny newcomers who **are** bona fide residents the full benefits of state citizenship. Nor may states enact laws with the purpose of discouraging people from migrating in. Whatever the State's authority to select its policies, it may not select its citizens. These precepts stem not just from the Equal Protection Clause, but also from the Citizenship Clause and Privileges or Immunities Clause of the Fourteenth Amendment, from the Privileges and Immunities Clause of Article IV, and from the "logic and structure of the constitutional scheme." *Nevada v. Hall*, 440 U.S. 410, 441 n.6 (1979) (Rehnquist, J., dissenting).

The State law at issue in this case, California Welfare and Institutions Code §11450.03, creates a multi-tiered benefits scheme that denies bona fide California residents eligibility for full public assistance on account of their recent arrival, and treats them as if they were still citizens of their prior states of residence. This law violates both the prohibition against **facial** discrimination against new state citizens and the prohibition against laws drawn with the **purpose** of discouraging migration into the state.

While section 11450.03 is subject to strict scrutiny, this Court need not reach the question of what level of scrutiny applies, since the California statute is not rationally related to any legitimate objective. The State does not even pretend that the measure is designed to determine bona fide California residency, nor could it plausibly do so since it unquestionably applies to those who **are** California citizens with the intent to remain in the state. To the extent that the law "intends to deter settlement into the state of persons who need welfare and seek a higher benefit," it has an "unconstitutional purpose." *Green v. Anderson*, 811 F. Supp. 516, 522 (E.D.Cal. 1993). On the other hand, to the extent that its purpose is to save costs, as the State now claims, the measure lacks any "rational design." *Id.* at

522-23. First, it disadvantages all eligible newcomer citizens notwithstanding that they are no better able to withstand any reduction in benefits than longer term residents. Second, it applies to all newcomers, even those who have settled in California for reasons totally unrelated to public assistance. Third, it does not simply create "two classes of needy resident families," *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), but further subdivides new Californians like state flags into forty-four separate categories based solely on the state in which they previously resided. Finally, the miniscule costs to be saved by the measure, even by the State's own estimate, confirm that it is hostility toward outsiders – not legitimate fiscal objectives – that drives the measure.

Nothing in the subsequently enacted federal statute, 42 U.S.C. §604(c), alters the unconstitutionality of California Welfare & Institutions Code §11450.03. As an initial matter, the purposes underlying the federal statute are irrelevant, in view of the California statute's purpose – repeatedly trumpeted by Petitioners – to deter people from settling in California. Moreover, contrary to the United States' argument, the purposes claimed to underlie the federal statute are not adequate under any level of scrutiny. In any event, Congress may not authorize or otherwise sanctify a discriminatory state law that infringes on the right of United States citizens to settle in whatever state they choose, with the "same rights" as other citizens of that state.

ARGUMENT

I. The Principle of Free Interstate Migration Prohibits Discrimination Against New State Citizens, As Well As Actual Barriers to Interstate Travel

A. The Structural Objectives of the Constitution Require That United States Citizens Be Free to Choose Their State of Residence and That State Citizens Be Treated Equally Regardless of Length of Residency

The objective of political unification uniquely structures our Constitution. As this Court has long held, the Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (Cardozo, J.). As most recently reiterated by Justice Kennedy: "It must be recognized that ' "[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country." ' " *United States Term Limits v. Thornton*, 514 U.S. 779, 840 (1995) (Kennedy, J., concurring) (quoting *Shapiro*, 394 U.S. at 630, quoting *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)).

The principle of free interstate migration, and the concomitant right of United States citizens to settle in whatever state they choose, are necessarily bound together with this structural aim. As this Court has observed: "The federalist structure of joint sovereigns preserves to the people numerous advantages," including "mak[ing] government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).[8] The right freely to migrate from one state

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[8] *See also Zobel*, 457 U.S. at 67-68 (1982) (Brennan, J., concurring):

> A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully – indeed, necessarily – consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

to another therefore "occupies a position fundamental to the concept of our Federal Union" and "has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *see id.* at 758 ("a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created"). It has received this Court's "unquestioned historic acceptance," regarded as a right that may be "inferred from the federal structure of government adopted by our Constitution." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality); *see also id.* at 903 ("Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.").[9]

Even before the Civil War Amendments, this Court viewed the right of United States citizens to settle in the state of their choice to be implicit in the structure of the

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[9] *See also Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160, 173-74 (1941); *Shapiro*, 394 U.S. at 629-31, 634; *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974); *Zobel*, 457 U.S. at 60 n.6.

Constitution.[10] The Framers of the Constitution understood this right to be essential to the federal republic they were creating.[11] Tracing early opinions by Justices of this Court, Justice O'Connor's *Zobel* concurrence located the foundation of the " 'right of a citizen of one state . . . to reside in any other state,' " in Article IV's Privileges and Immunities Clause. 457 U.S. at 80 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1823)):

> It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.

Zobel, 457 U.S. at 76-77.

As this Court has long held, and most recently reiterated in *Bray*, these structural precepts mandate that new arrivals to a state be protected "against **two** sets of burdens: [1] 'the erection of actual barriers to interstate migration' and [2] 'being treated differently' from intrastate travelers." 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60

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[10] In *Crandall*, for example, the Court struck down a state tax on passenger exit, eschewing reliance upon the dormant commerce clause and acknowledging that "no express provision of the Constitution" addressed the problem. 73 U.S. at 48. As Justice Rehnquist pointed out in *Nevada v. Hall*, the *Crandall* decision "appealed to the logic and structure of the constitutional scheme," a basis of the decision being that the law "is incompatible with the concept of one Nation." 440 U.S. 410, 441 & n.6 (1979) (dissenting opinion). Justice Rehnquist's *Nevada v. Hall* dissent expressed concern about a result that would "induce some 'Balkanization' in state relationships." *Id.* at 443.

[11] As Hamilton wrote: "It may be esteemed the basis of the Union that the 'citizens of each state shall be entitled to all the privileges and immunities of citizens of the several States.' " *The Federalist* No. 80, at 478 (Hamilton) (C. Rossiter ed. 1961).

n.6) (emphasis added); *see also Soto-Lopez*, 476 U.S. at 904 ("right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration"); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974); *Shapiro*, 394 U.S. at 629-32. As far back as *The Slaughter-House Cases*, this Court held that: "[A] citizen of the United States can by his own volition become a citizen of any state of the Union by a bona fide residence therein with the **same rights** as other citizens of that state." 83 U.S. (16 Wall.) 36, 80 (1873) (emphasis added).[12] This requirement of nondiscriminatory treatment is grounded in the recognition that:

> The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, **become the State's "own" and may not be discriminated against solely on the basis of their [recent] arrival in the State.**

Hooper, 472 U.S. at 623 (emphasis added). As Justice Kennedy has explained, the Constitution is "unprecedented in its form and design" in that it establishes that each state government, as well as the federal government, has "its own direct relationship" with and "its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring). Among the "obligations" that the Constitution thereby imposes on the states is that they may not discriminate against some of the "people who

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[12] *See also Slaughter-House Cases*, 83 U.S. at 112-13 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen.").

sustain it and are governed by it" based on the duration of their residency in the state.

To be sure, none of these cases foreclose states from adopting rules denying their benefits to those who are **not** bona fide residents and do not intend to remain in the state. A state university, for example, may enforce a tuition scheme allowing "bona fide [state] residents" to pay lower tuition rates, so as to prevent out-of-state residents who come to the state solely for an education from "tak[ing] advantage of the in-state rates" with no intent to remain there. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). Likewise, a state may limit the availability of its divorce decrees to bona fide residents, to ensure that it does not become a "divorce mill" for those who have "long resided elsewhere" and have not shown their "inten[t] to remain in the State." *Sosna*, 419 U.S. at 407; *see also Zobel*, 457 U.S. at 78 n.8 (O'Connor, J., concurring) (noting that "[i]n *Sosna*, the State showed that nonresidents were a peculiar source of the evil addressed" because they "could misrepresent their attachment to Iowa and obtain divorces that would be susceptible to collateral attack in other States.").

Upon establishing bona fide residence, however, an individual becomes a state citizen on equal footing with every other state citizen, regardless of duration of his or her residency. New state citizens may not be treated as if they were still citizens of their former state of residency, or otherwise accorded less favorable treatment on account of their more recent arrival.[13]

In addition to being embedded in the structure of the Constitution, the principle of equal treatment for new

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[13] The fact that the Constitution does not recognize dual state citizenship magnifies the importance of treating all bona fide state residents, including those who have recently settled, as full-fledged state citizens.

arrivals is built into three different clauses of the Fourteenth Amendment. First, as this Court repeatedly has recognized, this principle is "a particular application of equal protection analysis." *Zobel*, 457 U.S. at 60 n.6; *see also Memorial Hospital*, 415 U.S. at 251 (identifying "constitutional question presented" as "whether this durational residency requirement is repugnant to the Equal Protection Clause"). Second, it is reflected in and reinforced by the Citizenship Clause of the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States. . . . are citizens of the United States **and of the state wherein they reside**" (emphasis added). Under this clause, neither the federal government nor state governments may enact laws negating a United States citizen's choice of state residency, by classifying newcomers based on how long they have resided in a state so as to make them anything less than full-fledged citizens or in any other manner.[14] Finally, the principle finds expression in the Fourteenth Amendment's Privileges or Immunities Clause, which guarantees that "a citizen of the United States can of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. at 80.

B. This Court Has Consistently Struck Down State Laws According Less Favorable Treatment to Bona Fide State Citizens Based on Their Length of Residency

Neither the State nor any amicus questions the interconnection between the objective of political unification and the principle prohibiting discrimination against bona

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[14] *Hooper*, 472 U.S. at 623 n.14 ("[T]he Citizenship Clause of the Fourteenth Amendment 'does not provide for, and does not allow for, degrees of citizenship based on length of residence.' ") (citation omitted); William Cohen, "Discrimination Against New States Citizens: An Update," 11 *Const. Comm.* 73, 74, 78-79 (1994).

fide state residents based on their length of residency. As the United States properly recognizes, the principle of free interstate migration is rooted in "the nature of a national Union, as opposed to a federation of independent states." U.S. Amicus Br. at 23. While this Court has identified its textual source in several provisions of the Constitution,[15] the analysis has focused on whether new state residents are treated less favorably than other state residents: "Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Zobel*, 457 U.S. at 60 n.6 (citing cases); *see also Bray*, 506 U.S. at 277 (quoting *Zobel*).[16]

Thus, for example, the Court in *Shapiro* struck down a one-year durational residency requirement for receipt of welfare benefits as "a classification which constitutes an

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[15] For example, the freedom of interstate travel or migration has been rooted in the Privileges and Immunities Clause of Article IV, *see, e.g., Zobel*, 457 U.S. at 73-74 (O'Connor, J., concurring in judgment) (privileges and immunities analysis "supplies a needed foundation for many of the 'right to travel' claims discussed in the Court's prior opinions"); *Paul v. Virginia*, 75 U.S. at 180 ("[W]ithout some provision of the kind . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."); in the Commerce Clause, *see Edwards v. California*, 314 U.S. at 172-74; in the Privileges or Immunities Clause of the Fourteenth Amendment, *see id.* at 178-79 (Douglas, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); and in the Fifth Amendment Due Process Clause, *see Kent v. Dulles*, 357 U.S. 116, 125-126 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . [T]hat right was emerging at least as early as the Magna Carta. . . . Freedom of movement across frontiers . . . , and inside frontiers as well, was a part of our heritage. . . . Freedom of movement is basic in our scheme of values.").

[16] *See also Soto-Lopez*, 476 U.S at 904 n.4 (stating that "the standard of review is the same" "regardless of the label we place on our analysis – right to migrate or equal protection. . . . ").

invidious discrimination denying [new residents] equal protection of the laws." 394 U.S. at 627. *Shapiro*'s starting point was that "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited. . . . " 394 U.S. at 629. The Court held that "any classification which serves to penalize the exercise of th[e] right, unless shown to be necessary to promote a **compelling** governmental interest, is unconstitutional." *Id.* at 634 (emphasis in original).

Under this exacting standard, this Court has without exception struck down state laws according newcomers less favorable treatment with respect to public benefits that support the "basic necessit[ies] of life." *Memorial Hospital*, 415 U.S. at 259; *Shapiro*, 394 U.S. at 627; *see also Dunn v. Blumstein*, 405 U.S. at 342 (invalidating one-year residency requirement for voting). In *Memorial Hospital*, for example, the Court invalidated state denial of publicly funded non-emergency medical care to residents who had not yet lived for a year within the state, holding that the Constitution guarantees "new residents **the same right** to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." 415 U.S. at 261 (emphasis added).[17]

In *Shapiro*, *Memorial Hospital*, and *Dunn*, the Court applied strict scrutiny to void classifications disadvantaging newcomers based on the timing of their migration as impermissible "penalties" on their having exercised the right of interstate migration. In none of these cases did this Court insist upon actual proof that interstate travel had in

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[17] *See Memorial Hospital*, 415 U.S. at 259 ("[G]overnment privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.") (listing cases); *id.* at 285 (Rehnquist, J., dissenting) (there is "virtual denial of entry inherent in denial of welfare benefits – the 'very means by which to live.' ") (quoting *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)).

fact been impaired or deterred. *See, e.g., Dunn*, 405 U.S. at 340 (noting that right to travel analysis does not rest on "presence of actual deterrence"). In *Dunn*, for example, the Court expressly held strict scrutiny to be the proper standard because the state's "durational residence laws classify bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period." *Id.* at 338. As this Court has recently clarified, these holdings are grounded in the recognition that the Constitution's political unification objectives do not just prohibit "actual barriers to interstate movement." *Bray*, 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6). In each of these cases, the pivotal question was whether new residents were "**treated differently** from longer term residents" on account of their recent migration from another state. *Zobel*, 457 U.S. at 60 n.6 (citing *Memorial Hospital*, *Dunn*, and *Shapiro*) (emphasis added); *see also Bray*, 506 U.S. at 276-77 (right to travel prohibits " 'being treated differently' from intrastate travelers").

In other cases, this Court has struck down state schemes that make public benefits dependent upon the recency of one's taking up residency, without even having to reach the issue whether heightened scrutiny applies.[18] In *Zobel*, for example, the Court invalidated as irrational an Alaska statute that distributed income from natural resource development to state residents based upon when they had established residency in the state:

> If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence – or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.

Id. at 64 (footnote omitted). The Court quoted from Chief Justice Taney's dissent in *The Passenger Cases*, 48 U.S. (7 How.) at 492, that " '[s]uch a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.' " 457 U.S. at 64 n.12.[19]

Justice O'Connor concurred in the judgment, concluding that "Alaska's distribution plan distinguishes between long-term residents and recent arrivals," and that "[t]he Privileges and Immunities Clause of Article IV. . . . addresses just this type of discrimination." *Id.* at 73. As Justice O'Connor pointed out, "[s]tripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer term residents," *id.*, in direct contravention of the Constitution's political unification objective: "This inequality, as the Court repeatedly has recognized, conflicts with the constitutional purpose of maintaining a Union rather than a mere 'league of States.' " *Id.* (citing *Paul v. Virginia*, 75 U.S. at 180).

Other cases have applied rational basis review to strike down state laws discriminating based on length of state residency without having to reach the question

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[18] The Court in *Shapiro*, though applying strict scrutiny, made clear that the statutes reviewed would likely fail rational basis analysis as well: "[E]ven under the traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional." 394 U.S. at 638 (footnote omitted).

[19] *See also Zobel*, 457 U.S. at 66, 67 (Brennan, J., concurring) ("[T]he federal interest in free interstate migration . . . is clearly, though indirectly, affected by the Alaska dividend-distribution law, . . . provid[ing] an independent rationale for holding that law unconstitutional. . . . A scheme of the sort adopted by Alaska is inconsistent with the federal structure even in its prospective operation.").

whether heightened scrutiny applies. In *Hooper*, the Court struck down as irrational a New Mexico law granting a tax exemption to Vietnam veterans only if they had resided in the state before a specified date. 472 U.S. at 623. One year after *Hooper*, this Court invalidated on rational basis grounds a New York state law, which afforded a civil service preference to veterans who had resided in New York at the time they entered the military, but not to those who had resided outside New York when they entered the armed services. *Soto-Lopez*, 476 U.S. at 911. Significantly, the dissent of Justices O'Connor, Rehnquist and Stevens distinguished *Zobel* by defining the "penalty" analysis as asking whether **newcomers** were treated less favorably than longer term residents: "[T]he New York scheme does not effectively penalize those who exercise their fundamental right to settle in the State of their choice by requiring newcomers to accept a status inferior to that of all oldtime residents of New York upon their arrival." *Id.* at 922 (O'Connor, J., dissenting).

II. The California Statute Impermissibly Discriminates Against State Citizens Based On Their Length of Residence and Has the Impermissible Purpose Of Discouraging Migration Into California

California's durational residency statute is antithetical to the fundamental structural principle of national unity, which mandates that a State not treat its new citizens less favorably on account of the timing of their migration or make laws designed to deter migration into the state. As every lower court to date has concluded, regardless of the level of scrutiny applied,[20] there is no

[20] *See, e.g., Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998) (affirming on other grounds, *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. 1997)); *Warrick v. Snider*, 2 F. Supp. 2d 720 (W.D. Pa. 1997) (holding 60-day residency requirement unconstitutional); *Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998) (order granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Hicks v. Peters*, 10 F. Supp. 2d 1003 (N.D. Ill. 1998) (permanently enjoining 12-month durational residency requirement); *Ruffin v. Quasion*, No. C97-5767 FDB (W.D. Wa. Feb. 6, 1998) (order granting preliminary injunction); *Mitchell v. Steffen*, 504 N.W. 2d 198, 203 (Minn. 1993), *cert. denied*, 510 U.S. 1080 (1994) (holding six-month residency requirement "unconstitutional under the equal protection clause"); *Sanchez v. Department of Human Services*, 713 A.2d 1056 (N.J. Super. Ct. App. Div. 1998) (granting injunction); *Aumick v. Bane*, 612 N.Y.S. 2d 766 (N.Y. Sup. Ct. 1994) (permanently enjoining six-month residency requirement); *Brown v. Wing*, 663 N.Y.S. 2d 1025 (N.Y. App. Div. 4 Dep't 1997) (affirming permanent injunction against six-month residency requirement in 649 N.Y.S. 2d 988 (N.Y. Sup. Ct. 1996)); *Doe v. Wing*, No. 98/2903 (N.Y. Sup. Ct. July 30, 1998) (holding one-year residency requirement unconstitutional).

adequate justification for a state law that affords lesser public assistance benefits to bona fide state citizens who have resided in the state for less than one year.[21]

A. The California Statute Facially Discriminates Against New State Citizens, by Classifying Them Based on Their Length of Residency in the State

This Court has plainly held strict scrutiny applicable to laws like California's, that discriminate against new state residents with respect to the basic necessities of life. Like the state provisions invalidated in *Shapiro* and *Memorial Hospital*, the California durational residency law

[21] There is only one case, easily distinguishable from this one, in which any court upheld a public assistance waiting period of any length. In *Jones v. Milwaukee County*, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a 60-day "waiting period requirement" for general relief, concluding that "the 60 day waiting period [was] so substantially less onerous than the one year waiting period of *Shapiro*." *Id.* at 902. The court took note of the fact that the 60-day waiting period was designed " 'to establish the bona fides of the applicant's residency.' " *Id.* at 903.

discriminates against newcomers by creating "classes of needy resident families 'indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction.' " *Memorial Hospital*, 415 U.S. at 254 (quoting *Shapiro*, 394 U.S. at 627). *Shapiro* expressly repudiated the "welfare magnet" rationale, identical to that offered here, that the laws were "designed to protect the jurisdiction[s] from an influx of persons seeking more generous public assistance than might be available elsewhere." *Id.* at 629. Relying upon Chief Justice Taney's dissent in *The Passenger Cases*, the Court declared that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." *Id.* at 629-30.[22] The Court applied strict scrutiny, and held that states' legitimate concern for the "saving of welfare costs" could not support the discriminatory means chosen to accomplish this objective. *Id.* at 633.

Because the California statute discriminates against new residents, it is no less violative of the rights to free interstate migration and equal protection than the laws in *Shapiro*, and is subject to strict scrutiny.[23] The State's

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[22] *See also Shapiro*, 394 U.S. at 631 ("[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally.").

[23] The United States coins an argument that, because of the subsequent federal statute authorizing certain state durational residency requirements, 42 U.S.C. §604(c), the California statute should be subjected to intermediate scrutiny. U.S. Amicus at 10, 26. There is no reason why the existence of the federal statute should diminish the **level of scrutiny** to which a discriminatory state classification is subjected. At most, the presence of a federal statute might give rise to some additional rationales for the state law to be considered under the applicable level of scrutiny – although, as we explain *infra*, at 45-50, §604(c) was enacted *post hoc* and, in any event, provides no justifications that will satisfy any level of scrutiny, but simply repackages the state's impermissible aims.

argument for lesser scrutiny depends upon its failure to acknowledge this Court's repeated insistence that the fundamental right to interstate migration encompasses both "actual barriers" to travel and "being treated differently" from longer-term state residents. *Bray*, 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6). Its analysis would necessarily accord inferior status to the right of newer state citizens to be treated equally – notwithstanding this Court's repeated recognition that it is no less an essential component of the "federal guarantee of interstate travel" than the prohibition against actual barriers. *Id.* at 276. If any right is fundamental to our constitutional structure, it is that of all United States citizens to become full-fledged citizens of their state of choice by establishing bona fide residence therein. The State's contrary argument severs the prohibition against discriminatory treatment of newcomers from its national unity roots.

The State further argues that *Shapiro*'s strict scrutiny analysis is inapplicable because the California statute does not "penalize" new residents, but simply limits them to the amount that they would have received in their prior states, thus making them no worse off than they were before. State Br. at 22-24, 26.[24] This argument not only misstates the unchallenged facts of this case, but

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[24] Petitioners rely heavily on *Dandridge v. Williams*, 397 U.S. 471 (1971) to support their argument that rational basis review applies. Yet that case had nothing to do with differential benefits provided to newcomer residents, nor did it implicate interstate migration in any other way, but merely imposed a maximum benefit level on "large families." *See id.* at 484 n.16 (distinguishing *Shapiro*). As the Court expressly stated: "Although a State may adopt a maximum grant system . . . , it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause. . . ." *Dandridge* is therefore irrelevant to laws, like the one at issue here, that discriminate against newcomers or are intended to discourage migration into the state.

disregards the legal principle set forth in *Shapiro* and refined in subsequent right-to-migrate cases.[25]

As a factual matter, the State is simply wrong to argue that newcomer Californians will "suffer no detriment," compared to how they would have fared in their prior states of residence. State Br. at 17. Relying on undisputed evidence, the district court found: " '[B]ecause California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any state[] to live in subsidized housing, the residency requirement will place many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved.' " *Roe*, 966 F. Supp. at 981 (quotation omitted); *see also* J.A. 94.[26] Contrary to the State's contention, then, newcomer families will be in worse straits – many in substantially worse straits – than they would have been in their prior states of residence.

As a matter of law, the State's argument rests on a misapprehension of this Court's right-to-migrate jurisprudence in two fundamental respects. First, as this Court has consistently held, the relevant right is the freedom to migrate to, settle in, and thereby become a full citizen of, the state of one's choice, without "being disadvantaged because of . . . recent migration" or "otherwise **being treated differently from longer term residents.**" *Zobel*, 457 U.S. at 60 n.6 (emphasis added); *see also id.* at 76

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[25] Petitioners' argument fails even to distinguish *Shapiro* on its facts. As in this case, the denial of benefits considered in *Shapiro* was not in all instances total either. Although two of the three states involved (Connecticut and Pennsylvania) gave "partial assistance," these schemes were nevertheless invalidated. 394 U.S. at 635.

[26] *See also Green*, 811 F. Supp. at 521. The State makes no claim that these findings as to impact of the statute were erroneous, much less clearly erroneous as would be required to overturn the preliminary injunction.

n.6 (O'Connor, J., concurring) ("It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the New State that he lacked completely in his former State. The Clause addresses only differences in treatment. . . . "). The problem with the State's analysis is that, instead of comparing "newcomers and longer term residents," it compares new Californians – including those who are native Californians returning to the State – to residents of their former states. State Br. at 17, 23-24. Nowhere has this Court even remotely suggested that this is the proper test. In *Shapiro* and *Memorial Hospital*, for example, this Court did not ask whether newcomers were worse off than they had been before migrating; instead, the Court asked whether the state law "create[d] a classification which constitutes an invidious discrimination denying [new residents] equal protection of the laws." *Shapiro*, 394 U.S. at 627. The proper question, then, is whether new Californians are being treated less favorably than **other Californians**, not whether new Californians are receiving less than they would have received, had they never left Oklahoma or Mississippi. *See Zobel*, 457 U.S. at 60-65.

If the reformulation applied by the State were correct, then *Zobel* would necessarily have come out the opposite way. No state other than Alaska provided bounty payments to its citizens based on years of state residency. Therefore, under the State's argument, Alaska should have been free to pay new Alaska residents precisely the bounty that residents of other states received: nothing at all.[27] Similarly, states that have no income tax would be free to impose income taxes on newcomer state residents alone, either to discourage them from migrating

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[27] Nor was it of any "significance in *Memorial Hospital* that the non-emergency care provided by Maricopa County may have been much superior to the medical care provided elsewhere." *Green*, 811 F. Supp. at 521.

or to augment state coffers. So long as newcomer residents were taxed at the rates they would have been assessed in their prior states, such a taxation scheme would present no constitutional problems under the State's analysis. By the same token, a state like California that has adopted a higher minimum wage than the national minimum could, in order to prevent low-wage workers from coming into the state, make an exception for newcomers allowing them to be paid less than everyone else. If California's rule were accepted, then states would be free to hoard resources for longer-term residents in a variety of ways, either by keeping newcomers from sharing equally in state benefits or by requiring newcomers to bear a disproportionate share of state burdens.[28]

The second error in the State's analysis is that it introduces a definition of "penalty" that is foreign to the Court's doctrine, and completely unmanageable in practice. The cases striking down durational residency requirements have never required a showing that people have actually been deterred from migrating, nor have they hinged on measurement of how much worse off newcomers are. *See supra*, at 20; *Memorial Hospital*, 415 U.S. at 258 ("An attempt to distinguish *Shapiro* by urging that a durational residence requirement . . . did not deter travel, was found to be a 'fundamental misunderstanding of the law' in *Dunn*, [405 U.S.] at 339-340."). These cases instead turn on whether the laws in question "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." *Dunn*, 405 U.S. at 342. It makes no difference whether the denial to new California citizens is

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[28] The State has admitted that such rules would be permissible under their formulation: "At oral argument counsel acknowledged that under the defendants' analytical approach, any State service, benefit or, indeed, tax or other imposition, keyed to the level of the new resident's former state would be constitutional." *Roe*, 966 F. Supp. at 984 n.17.

100%, 80% or some lesser percentage of the level that the state legislature has deemed appropriate for others in need of assistance. Nor does it matter whether the duration of the residency requirement is one year, three years, or forever. The material question, instead, is whether newcomers are **"treated differently"** than longer-term residents, *Bray*, 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6) (emphasis added). In arguing that this clear test should be replaced with an inquiry into whether there has been a "significant and severe penalty on travel" (State Br. at 26), Petitioners advocate a vague standard that would require the lower courts to make individualized inquiries into how drastic an impediment to migration the State has imposed in each case.[29]

The State attempts to avoid the rule requiring strict scrutiny of laws discriminating against newcomers in the

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[29] The responses by counsel for the State of California to questions from Members of the Court at oral argument in *Anderson v. Green* are illustrative of the State's flawed analysis:

> QUESTION: . . . [L]et me ask you, would a 3-year waiting period raise problems that this statute doesn't?
>
> COUNSEL: I believe amounts over a year would raise more problems. It would raise progressively more problems.
>
> QUESTION: Why is that, if it's not a penalty, it's not a penalty?
>
> * * *
>
> QUESTION: Under what constitutional standard? What constitutional rule would be violated?
>
> COUNSEL: Well, it would be a penalty at that point. It would impact more on a right to travel at that point.
>
> QUESTION: So the longer the disability, the more it impinges on the right to travel?
>
> COUNSEL: I think we would have to admit that, yes.

Tr. Jan. 17, 1995, at 19.

area of public assistance, by arguing that this case involves only a temporary rather than a permanent classification – and therefore, presumably, a less severe sanction against newcomers' decision to settle in their state of choice. State Br. at 19-20. This line of reasoning, cannot distinguish *Shapiro*, *Memorial Hospital*, or *Dunn* all of which invalidated one-year waiting periods. As in *Shapiro* and *Memorial Hospital*, the plaintiffs here are deprived of something that is "necessary for basic sustenance," *Memorial Hospital*, 415 U.S. at 259, the benefit of which is lost forever if not provided when needed. *See id.* at 259 n.15 (contrasting "necessities of life" with in-state tuition).

Nor is the State's temporary/permanent distinction consistent with the reasoning in other cases decided by this Court. The basis for the holding in *Zobel*, for example, was not that the Alaska statute was a permanent classification or that it actually had the effect of deterring people from settling in the state. The Court instead rested its decision on the fact that the Alaska statute drew "distinctions between residents based on when they arrived in the State." *Id.* at 60 n.6. If the Alaska legislature had chosen in 1979 to make the oil bounty dividend a one-time special distribution to citizens graduated by years of residence, as opposed to an ongoing one, the scheme would have been no less irrational. Chief Justice Burger's admonition that "Alaska's reasoning could open the door to state apportionments of other rights, benefits, and services according to length of residency," *id.* at 64, would apply with no less force to such a discriminatory allocation of public goods.

The California statute is even more clearly in conflict with the principle forbidding discriminatory treatment of new arrivals than the schemes at issue in *Zobel*, *Shapiro*, and *Memorial Hospital*. Justice O'Connor's description of Alaska's scheme as "classif[ying] citizens on the basis of their former residential status," *Zobel*, 457 U.S. at 75, applies with even greater force to California's scheme, which classifies Californians based not just on their recency of arrival, but also on the state from which they

came into 44 separate categories.[30] Our federal structure does not countenance such multi-tiered distinctions among bona fide state citizens based on when – and from where – they arrived.

B. The California Statute Has the Impermissible Purpose of Deterring Migration into the State

Wholly apart from its facial discrimination against newcomers, the California law must be held unconstitutional because of its undisguised purpose of deterring people from settling in California. *See supra*, at 4-7. The prohibition against laws drawn with an invidious purpose is a familiar principle in our constitutional law.[31] This Court has unwaveringly held that any law enacted with "[a] state objective to inhibit migration into the state would encounter 'insurmountable constitutional difficulties.' " *Hooper*, 472 U.S. at 620 n.9 (quoting *Zobel*, 457 U.S. at 62 n.9); *Memorial Hospital*, 415 U.S. at 263-64 ("to the extent the purpose of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible"); *Shapiro*, 394

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[30] Newcomers are divided into 44 (rather than 50) categories since there are five states with assistance levels that, in absolute terms, are higher than California's. Newcomers from these states receive the same amount as longer-term Californians.

[31] *See, e.g., Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (proof of racially discriminatory intent sufficient to trigger strict scrutiny under Equal Protection Clause); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (purpose to promote religion renders statute presumptively invalid under the Establishment Clause); *Madsen v. Women's Health Center*, 512 U.S. 753, 763 (1994) (in determining whether a law is content-based in presumptive violation of the Free Speech Clause, "[w]e . . . look to the government's purpose as the threshold consideration.").

U.S. at 629.[32] In *Memorial Hospital*, for example, this Court held:

> "[A] State may no more try to fence out those indigents who seek [better public medical facilities] than it may try to fence out indigents generally." An indigent who considers the quality of public hospital facilities in entering the State is no less deserving than one who moves into the State in order to take advantage of its better educational facilities.

415 U.S. at 264 (quoting and citing *Shapiro*, 394 U.S. at 631-32; bracketed phrase in original).[33]

To be sure, one of the "numerous advantages" deriving from a "decentralized government" of "joint sovereigns" is the "allow[ance] for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. at 458. States may not, however, attempt to prevent newcomers from participating in such innovations. Otherwise, states would be free to pick and choose the membership of their communities, or otherwise excuse themselves from national problems, by shifting responsibility to other

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[32] As set forth in the Social Scientists' Amicus Brief, the available research undermines the State's hypothesis that people migrate from one state to another for the purpose of increasing their benefits; *see also* J.A. 119-44.

[33] *See also Shapiro*, 394 U.S. at 633 ("[N]either deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective"); *Memorial Hospital*, 415 U.S. at 282 (Rehnquist, J., dissenting) (distinguishing the Arizona law from one that "was specifically designed to . . . deter indigent persons from entering the State of California"); *id.* at 283 (distinguishing a "purposeful attempt to insulate the State from indigents"); *id.* at 284 ("purposeful barriers [were] struck down in *Edwards* and *Shapiro*"); *id.* at 285 ("the Court should examine . . . whether the challenged requirement erects a . . . purposeful barrier").

states.[34] Petitioners' contrary argument is therefore on a collision course with Justice O'Connor's insight in *Zobel* that our federal system guarantees individuals the right to shop around for States with programs best suited to their needs or tastes. 457 U.S. at 77 (O'Connor, J., concurring). Under Petitioners' argument, a state that has adopted a unique and innovative job training program under TANF could bar newcomers from participating in the program altogether. States would be free to deny this and all manner of other public goods to their newer citizens, on the ground that those citizens would be "no worse off" than they were in their prior states.[35]

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[34] As this Court explained in *Edwards v. California*:

> The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.

314 U.S. at 173.

[35] While the United States properly acknowledges that "discouraging poor people generally from settling in the State" is an "invidious purpose" (U.S. Amicus at 30 n.11), it conclusorily asserts that the record does not provide an adequate basis for assessing whether this was the California law's purpose. *Id.* at 10, 28. In fact, the undisputed evidence below, including defendants' own assertions as to the law's intent, leaves no doubt that section 11450.03 was primarily designed to discourage indigent families from settling in the State. *Roe*, 134 F.3d at 1404; *see also Green*, 811 F. Supp. at 521-22 & n.14.

III. The State Offers No Justification For Its Discrimination against Newcomers That Is Adequate Under Any Level of Constitutional Scrutiny

A. The State's Asserted Fiscal Objectives Cannot Justify California's Discrimination Against Its Newer Citizens

Disregarding the statute's text and legislative history, as well as their own representations to the federal government and throughout the litigation, Petitioners now assert conservation of fiscal resources as the statute's principal purpose. This Court has repeatedly held that such an interest cannot justify laws that classify citizens based on the length of their residency, and thereby places the fiscal burden squarely on the backs of newcomers:

> [A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . , so appellees must do more than show that denying free medical care to new residents saves money.

Memorial Hospital, 415 U.S. at 263 (citation omitted).

Even if heightened scrutiny is not applied, the California statute must still be held unconstitutional. Once it is "stripped of the unconstitutional purpose of deterring migration" it lacks any "rational design," *Green*, 811 F. Supp. at 522-23, in several respects:

1. The California statute accomplishes its purported fiscal aims exclusively by the impermissible means of discriminating against new state citizens[36] – notwithstanding

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[36] This Court has never had difficulty piercing state attempts to disguise such discrimination against outsiders. For example, in the related context of economic protectionism prohibited by the dormant Commerce Clause, this Court has consistently noted that " 'the evil of protectionism can reside in legislative means as well as legislative ends.' " *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 360 (1992) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). A protectionist statute might aim to " 'assure a steady supply of milk,' " or " 'to reduce the waste disposal costs,' " in addition to aiming at favoring insiders over outsiders. *Id.* But the Court has never hesitated to strike such statutes down, notwithstanding their "presumably legitimate goal," where they involve the "illegitimate means of isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. at 627.

that they are no better able to withstand reduction in subsistence level benefits than longer term residents. *Id.* at 523.

2. The irrationality of California's scheme is compounded by the further multiple distinctions it draws among new residents depending on their state of previous residence. Even if the State could somehow show that new residents generally had lesser needs, there is certainly no evidence or basis to conclude that new residents migrating from Mississippi, for example, need 80% less to live in California than new residents migrating from Alaska.

3. The purported fiscal justification is particularly irrational given that, even using the State's own estimates, newcomer families constitute less than one percent of the total number of families receiving assistance. *See, supra*, at 2-3 & n.4. The undisputed record demonstrated that California could easily have saved the modest amount it allegedly seeks to conserve through the alternative of reducing assistance to all recipients by just 72 cents per month. Pet App. 36-37; *see supra*, at 7. Even by the State's own estimate, the amount to be saved by implementation of section 11450.03 is minuscule, amounting to 0.38% of the total program budget – and the percentage going to newcomers who came for the purpose of receiving higher benefits is necessarily even less than that.

4. Within the class of newcomers, the State's scheme makes no attempt to discern which have come into the State for the purpose of receiving higher benefits. As the California Legislative Analyst has acknowledged, newcomers receiving aid may have migrated to California for

any number of reasons other than maximizing their benefit level. J.A. 60-61. The California statute nevertheless denies full benefits to all newcomers – including those who received welfare in the state of prior residence and those who did not, those who need welfare when they arrive in California and those who come to that need months thereafter. *Green*, 811 F. Supp. at 522.[37] It offers them no opportunity to demonstrate, for example, that they settled in California to accept or seek employment, to escape domestic violence, or to secure the advantages of a state TANF program offering superior employment or educational opportunities.

Even if the State had some legitimate basis for concluding that some welfare recipients come to California for the purpose of receiving higher benefits, and that this "welfare magnet" effect was imposing a substantial fiscal burden, California's scheme would still be insupportable. As this Court pointed out in *Vlandis*, "apportion[ment of] tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause," 412 U.S. at 450 n.6, since "the State has reasonable alternative means of making the crucial determination." *Id.* at 452. So too, in this case, the State has reasonable alternative means by which to determine whether new arrivals to California came for the purpose of obtaining higher benefits. Section 11450.03 does not provide for such a determination, but instead, like the statute in *Vlandis*, operates on a blanket presumption that all new arrivals came to avail themselves of California's assistance levels.

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[37] Nor is there any reason why new Californians whose last residence was a foreign nation should be accorded superior status to newcomers from within the United States. *See Roe*, 966 F. Supp. at 980.

B. As the State Has Never Denied, the California Statute Cannot be Justified as an Attempt to Determine Bona Fide Residency

The California statute's one-year durational residency requirement cannot be upheld as a means by which to determine bona fide California residency. California's one-year durational residency requirement does not purport to be a bona fide residency requirement, but instead denies full benefits to bona fide California residents who have settled in the State during the past 12 months.[38]

This Court, moreover, has repeatedly struck down extended length of residence distinctions as measures of bona fide residence. The only exception has been a one-year requirement for lower in-state university tuition turning on the transient character of students and the risk that students will misrepresent their true domicile. The Court in *Zobel* pointed out that its summary affirmance in *Starns v. Masterson*, 401 U.S. 985, "cannot be read as a contrary decision of this Court," and that it considered Minnesota's

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[38] That the 12-month requirement cannot be supported as a means by which to assess bona fide California residency is confirmed by California Government Code §244, which defines residence as the "place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose." All members of the plaintiff class are indisputably California residents under this definition.

Furthermore, the State already has regulations designed to determine whether someone applying for benefits is indeed a bona fide resident. For example, a person who buys or leases a home, works, or obtains a driver's license in another state is presumed not to have the intent to reside in California. Manual of Policies & Procedures ("MPP") §42-407.235. Likewise, whenever a recipient is absent from California for 30 days or more, the agency must investigate his or her intent to return, and absence of 60 days or more is prima facie evidence of intent to abandon California residence. Cal. Welf. & Inst. Code §11100; MPP §§42-406.1, 407.21, 407.23.

requirement "a test of bona fide residence." 457 U.S. at 64 n.13; *see also Martinez v. Bynum*, 461 U.S. 321, 328 (1983) ("A bona fide residence requirement appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for [state] residents are enjoyed only by residents."); *Vlandis*, 412 U.S. at 453-54 (state may "establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.").

Sosna v. Iowa, 419 U.S. 393 (1975), is likewise consistent with the structural principles of national unity and interstate accord underlying the Court's invalidation of residency requirements in *Shapiro, Memorial Hospital, Dunn, Zobel, Soto-Lopez* and *Hooper*. In *Sosna*, the Court upheld Iowa's one-year waiting period for divorce decrees, as a means by which to ensure that the state did not become a "divorce mill" for those not who did not really "intend[] to remain in the State." *Id.* at 407. The Court reasoned that "the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution . . . than was the case in *Shapiro, Dunn*, and *Maricopa County*." *Id.* at 409 (citations omitted); *see also Zobel*, 457 U.S. at 78 n.8 (O'Connor, J., concurring).[39] The Court stressed that the requirement "additionally furthers the

[39] *Sosna* also relied on the facts that "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." 419 U.S. at 404. In contrast to domestic relations, the area of public welfare assistance is decidedly **not** one that has "long been regarded as a virtually exclusive province" of the states, *id.* but is one over which the federal and state governments have long shared responsibility. *See, e.g., Townsend v. Shenk*, 404 U.S. 282, 291 (1971).

State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." *Sosna*, 419 U.S. at 407.[40] The State has identified no comparable interest in this case, nor is any such interest conceivable.

The same structural principles on which *Sosna* relied compel invalidation of the California statute. As Justice O'Connor has explained, Iowa was understandably concerned that "nonresidents were a peculiar source of the evil addressed" because they "could misrepresent their attachment to Iowa and obtain divorces," *Zobel*, 457 U.S. at 78 n.8 (O'Connor, J., concurring), only to transport the benefits of Iowa's decrees elsewhere immediately.[41] The Iowa law and the California statute are therefore polar opposites. The Iowa law was targeted at divorce litigants because they lacked genuine intent to remain within the

[40] The Court explained: "A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere. Until such time as Iowa is convinced that appellant intends to remain in the State, it lacks the 'nexus between person and place of such permanence to control the creation of legal relations and responsibilities of the utmost significance.' " *Id.* at 407 (citation omitted).

[41] Unlike divorce decrees or college educations, subsistence payments are not transportable to other states; rather the benefits cease should the recipient relocate to another state. The *Sosna* Court expressly relied on this difference between welfare benefits and divorce decrees, in noting that the Iowa law did not "irrevocably" prevent the plaintiff from obtaining "some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*." 419 U.S. at 406. While the benefits of divorce decrees may be enjoyed even if delayed, the benefits of public assistance are lost forever if not received when needed.

State. In contrast, California is targeting individuals precisely because they **do** intend to remain: It is their settlement in and consequent attachment to the State that the statute aims to discourage.

IV. The Subsequently Enacted Federal Statute Does Not Affect The Unconstitutionality of the California Statute

Nothing in the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), passed by Congress after the enactment of section 11450.03, alters the analysis under this Court's durational residency jurisprudence or cures the constitutional infirmity in the California statute. It is settled law that Congress' approval of a state's discriminatory practice is irrelevant to its unconstitutionality under the Fourteenth Amendment. This Court has never suggested that Congress has the power to turn state citizenship into a seniority system, or allow states to do so, by classifying citizens based on length of residency.

A. Congress Has No Power to Authorize or Cure the Unconstitutionality of a State Law That Impermissibly Discriminates Against State Citizens Based on Their Length of Residency

Although the PRWORA was presumably enacted pursuant to Congress' spending power, it is settled law that this "power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). It is an equally established principle, reiterated by this Court in a variety of contexts, that Congress lacks the power to authorize a state's discriminatory classification. Thus, in *Shapiro v. Thompson*, this Court squarely repudiated the very argument made by Petitioners and the United States in this case. Just as in this case, the state defendants in *Shapiro* argued that "the constitutional challenge to the waiting period requirements must fail because Congress expressly approved the imposition of the requirement by

the States. . . . " 394 U.S. at 638. The Court held that the existence of this federal statute, even if read to "approve the imposition of a one-year waiting period," could not undo the unconstitutionality of the state statutes' discrimination against bona fide residents based upon their recent arrival in violation of their right to equal protection. *Id.* at 641.

As an initial matter, Petitioners' argument repeats the analytic error made by the states in *Shapiro*. As in *Shapiro*, what is being challenged here is not the federal law, but a discriminatory state statute that treats newcomers differently because of their recent migration to the state:

> [I]t is the responsive state legislation which infringes constitutional rights. By itself [the federal statute] has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

Id.

The *Shapiro* Court further explained that the federal statute, even if directly at issue, could not remedy the unconstitutionality of the one-year durational residency requirements: "Congress may not authorize the States to violate the Equal Protection Clause." 394 U.S. at 641.[42] So too in this case, the fact that, subsequent to the enactment of section 11450.03, Congress purported to authorize states to enact such laws does not alter the constitutional analysis. The Court has repeatedly reaffirmed the principle, ignored by the State, that: "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (rejecting an argument by a state university that Congress

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[42] *See also Townsend v. Shenk*, 404 U.S. at 291; *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); *Macias v. Finch*, 324 F. Supp. 1252, 1258 (N.D. Cal.) (three-judge court), *aff'd sub nom., Macias v. Richardson*, 400 U.S. 913 (1970).

had authorized it to deny enrollment to qualified males).[43] Even if the federal statute were being directly challenged here, discrimination against newcomers perpetuated by the federal government would fare no better than the state's. *See Adarand*, 515 U.S. at 217, ("[T]his Court's approach to Fifth Amendment equal protection claims has always been the same as to equal protection claims under the Fourteenth Amendment.") (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

B. Congress Has No More Authority Than the States to Classify State Citizens Based on Their Length of Residency in the State

Petitioners' reliance on PRWORA hinges on the argument that Congress may authorize states to do something that the states may not themselves do: to classify citizens of a State based on their length of residency within that State. The State's theory therefore creates an obvious and irreconcilable conflict not only with settled equal protection doctrine but also with the Citizenship Clause of the Fourteenth Amendment, which denies both Congress and the states the power to render some residents of a state "less equal" than others.[44]

If the Citizenship Clause means anything, it must mean that, once bona fide residency in a state is established, a United States citizen becomes a full-fledged citizen of the state within which he or she has chosen to reside. That person's state citizenship is encased from interference by federal and state governments alike. This is

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[43] The *Shapiro* Court, after holding state durational residency statutes unconstitutional, went on to hold a one-year waiting period adopted by **Congress** for the District of Columbia unconstitutional under the Fifth Amendment. 394 U.S. at 642.

[44] The Clause reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."

clear both from the text and from the history of the Citizenship Clause. The Citizenship Clause does not just restrain state governments, but prevents both the state and federal governments from denying state citizenship to any bona fide state residents.

The reason for taking the power out of the hand of both the states and Congress is readily apparent. The Fugitive Slave Acts of 1793 and 1850 were prominent features of the backdrop against which the Fourteenth Amendment was enacted. *See, e.g.*, HENRY MAYER, ALL ON FIRE 310-11, 407 (1998) ("It was clear to all parties that the 1850 Fugitive Slave Law was . . . a deliberate condemnation of the abolitionist agitation that had unsettled traditional politics, . . . "); PAUL FINKELMAN, AN IMPERFECT UNION 3 (1981) ("The status of fugitive slaves . . . was preempted by the Constitution's Fugitive Slave Clause and ultimately by two federal statutes implementing it."). The Union's then-recent history thus makes it highly implausible that the framers of the Fourteenth Amendment would have sought to curb the power of the states to deny equal citizenship to all their residents, while leaving the federal government free to do just that. If anything, vesting power to limit state citizenship in Congress would have been more destructive to the object of national unification – and more likely to generate friction among the states – than vesting this power in the several states. To paraphrase Chief Justice Taney, leaving such a power in Congress' hands could produce nothing but "discord and mutual irritation" for the recently reconstituted United States. *See The Passenger Cases*, 48 U.S. at 492 (Taney, C.J., dissenting). The Fourteenth Amendment thus expressly denies Congress as well as the states the power to authorize discrimination against new state citizens based on the recency of their arrival.

C. Allowing Congress to Interfere with the Right to Interstate Migration Would Decimate the Political Unification Objectives Upon Which That Right is Based

Even aside from the Fourteenth Amendment, the Constitution does not permit Congress to create barriers to interstate migration or to authorize discrimination against newcomers. *Bray* reiterates the longstanding principle that the "guarantee of interstate travel" prohibits not only " 'the erection of actual barriers to migration' " but also " 'being treated differently' from intrastate travelers." 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6). The *Bray* majority decisively rejected the argument that the freedom of interstate migration was rooted in the Commerce Clause – and the concomitant argument that Congress would have the power to tamper with the right of migration between states.

Responding to the dissent's argument that "conduct that evenhandedly disrupts both local and interstate travel" may violate the Commerce Clause, 506 U.S. at 276-77 n.7 (quoting *id.* at 337 (Stevens, J., dissenting)), *Bray* unequivocally confirmed Congress' lack of power to abrogate the right to travel:

> Justice Stevens expresses incredulity at the rule we have described. . . . We cite right-to-travel cases for our position; he cites nothing but negative Commerce Clause cases for his. While it is always pleasant to greet such old Commerce Clause warhorses as *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), cited *post*, at 337, . . . surely they are irrelevant to the individual right of interstate travel we are here discussing. **That right does not derive from the negative Commerce Clause, or else it could be eliminated by Congress.**

Bray, 506 U.S. at 277 n.7 (emphasis added). *See also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (the dormant commerce and equal protection clauses "perform different functions in the analysis of the permissible

scope of a State's power – one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.").[45] Whatever the textual sources of the right to free interstate migration, that right is protected from interference by the federal and state governments alike.

D. None of the Purported Justifications Offered by the United States Can Support the California Statute's Discriminatory Classification of New State Citizens

The California statute cannot be sustained by resort to any of the purposes the United States offers up in support of the federal law. In this case, as it has done elsewhere, the United States concedes that a purpose "to deter migration of poor people" bears "no rational relationship to any legitimate state purpose." *Id.* at 19.[46] The lower courts' finding of such purpose here should therefore be sufficient to resolve this case, irrespective of Congress' purpose in enacting the PRWORA.

Even if this Court were to look to the claimed purposes underlying the PRWORA, however, they provide no

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[45] The United States properly acknowledges that the principle of free interstate migration, including the right of newcomer state citizens to be treated the same as old-timers, may not be abridged by Congress any more than by the states. U.S. Amicus at 24.

[46] In *V.C. v. Whitburn* (No. 94-C-1028) (E.D. Wis.), the United States argued that a Wisconsin scheme with a much less severe impact on newcomers "would not be held constitutional" under "existing Supreme Court precedent," J.A. 155-56, pointing out that "Supreme Court cases make clear that the relevant comparison has consistently been between new and longtime residents of the same state," and that " 'neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.' " *Id.* at 156, 157 (quoting *Shapiro*, 394 U.S. at 633).

support for California's discriminatory classification of relatively new state citizens. The United States concedes that:

> Through Section 11450.03, the State seeks to treat some of its citizens differently from others solely on the basis of how recently they became residents of the State. This Court's cases make clear that any state classification drawn on that basis is constitutionally problematic.

U.S. Amicus at 18. While the United States offers three purported justifications for such differential treatment, close examination reveals each to be dependent upon the same impermissible purposes on which the State relies. The United States' rationales are either a cognate for the State's "welfare magnet" rationale or an end dependent solely upon the impermissible means of "eliminating or mitigating any given individual's perceived incentive to move." U.S. Amicus at 16.

1. *"Distorted incentives."* The first of the "federal purposes" proffered by the United States is to prevent "distorted incentives for interstate migration by benefit recipients." U.S. Amicus at 20; *see also id.* at 15 (describing Congress' goal to "mitigate incentives for interstate migration"). This rationale provides no principled basis for limiting discrimination against newcomer state citizens in the area of TANF benefits. The purported objective of avoiding incentives for interstate migration could be used to justify **any** durational residency requirement restricting the availability of **any** benefit or program to new state citizens.

In reality, the United States' "distorted incentives" rationale simply places a different spin on the State's "welfare magnet" hypothesis. Like the State, the United States relies on the proposition that discouraging migration of needy people who seek higher welfare benefits is a legitimate (and even "important") governmental purpose. There is no evidentiary foundation for the hypothesis that poor people move to and establish residence in a new state to obtain higher public assistance benefits. *See supra*, at

8-9.[47] This hypothesis is doubly suspect here given that no recipient can receive assistance for more than five years in total, regardless of state or states of residence. *See* 42 U.S.C. §608(a)(7); Cal. Welf. & Inst. Code §11320.15; *see supra*, note 1. But even assuming that there is some foundation for this hypothesis, the Constitution does not permit classifications designed to discourage people from settling within a state's boundaries in search of programs better suited to their needs. To the contrary, as Justice O'Connor has put it, our "federal system . . . allows the individual to settle in the State offering those programs best tailored to his or her tastes." *Zobel*, 457 U.S. at 77.

2. *"Choice-of-law."* The second purported justification, echoing throughout the United States' brief, is that the federal statute "addresses the unique choice-of-law considerations that may reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules." U.S. Amicus at 20. But as the United States also concedes, this "choice-of-law" rationale cannot possibly support California's scheme, which applies even to applicants – like the named plaintiffs in this case – who have **never** previously received benefits in any other state. This rationale, accordingly, cannot support California's scheme. *See* U.S. Amicus at 28-29 ("The State's provision is not . . . limited to applicants who were receiving TANF benefits in their prior State of residence at the time they moved, the situation in which the choice-of-law rationale for the limitation most readily applies."). California's law is doubly inexplicable as a choice of law rule, since it applies not to all those who have come from other states, but only to those from states with **lower** benefits.

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[47] The absence of any welfare magnet phenomenon with respect to California is not difficult to understand, given its shortage and high cost of housing for low income families. *See* Social Scientists' Amicus; J.A. 91-97.

The United States' "choice-of-law" rationale would additionally allow a state to "choose" to treat its own citizens as though they were still citizens of their former states. As many times as the United States' brief repeats the phrase "choice-of-law" (U.S. Amicus at 8, 9, 14, 15, 20, 22, 23, 24, 27, 28), it offers no other explanation of what this term is supposed to mean. Nor does this asserted rationale furnish any limiting principle. If it is acceptable for the state to choose to apply another state's laws to its new citizens in this context (at least to the extent that the other state's law affords less favorable treatment), it is difficult to see why states should not always be allowed to do so. Predicated on the unexplained premise that the former state of residence somehow "retains a sufficient connection to the family's continued receipt of benefits under the federal program that its law may properly be taken into account by the destination State during a transition period," (U.S. Amicus at 22), the United States' rule could apparently be applied to any number of public goods that are funded or regulated by the federal government. See U.S. Amicus at 22. A state, for example, might choose to deny its new citizens the benefits of its federally funded job training, education programs or even medical care. *See Memorial Hospital*, 415 U.S. at 261. Beyond its obvious unmanageability, adoption of the rationale would license states to "classif[y] citizens on the basis of their former residential status" by subjecting them to their former state's legal regime. *See Zobel*, 457 U.S. at 75 (O'Connor, J., concurring).

3. *"Race to the bottom."* The third "federal purpose" asserted by the United States is to "mitigat[e] any tendency . . . toward a 'race to the bottom' in the State-by-State establishment of benefit levels." U.S. Amicus at 20. While acknowledging "doubt[ ]" as to whether "an individual State, pursuing its own interests, would ever have valid reasons for distinguishing new citizens from old in allocating benefits in a program designed and funded solely by the State," *id.*, the United States argues that the

existence of the federal statute and federal funding somehow legitimates such discrimination.

As an initial matter, the United States' "race to the bottom" argument rests on two false premises: (1) as a result of the differences in the amount of benefits offered by different states, a substantial number of recipients will actually decide to migrate interstate in order to obtain higher welfare benefits and (2) that the higher-paying states will thereupon lower the amounts they pay to all their residents, in order to discourage such migration. The first premise is contradicted by the evidence of record. *See supra*, at 8-9; J.A. 115-17, 119-44; Social Scientists' Amicus. The second premise is also demonstrably false, as states have in fact chosen to offer widely varying levels of public assistance, as they have always been free to do, J.A. 26, notwithstanding the theoretical possibility that recipients might choose to move interstate to obtain higher benefits.

More fundamentally, the United States' "race to the bottom" rationale would prove far too much. Whenever states choose to offer different benefits or programs, there is always the theoretical possibility that some people will be attracted to migrate to the state with offerings best suited to their needs. The "race to the bottom" rationale thus turns on its head one of the cardinal rules of our constitutional structure: " '[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted). Among the most important benefits of decentralized government is that "a mobile citizenry" may make considered judgments about the nationwide marketplace of programs, to find those best suited to her needs and aspirations or to those of her family. *See Gregory v. Ashcroft*, 501 U.S. at 458. Even aside from the rule that deterring migration is constitutionally impermissible, whether as an end or means, the rationale identified could be cited whenever a state sought to pull any of its programs, benefits, or protections from the marketplace. A real or imagined "race-to-the-bottom" might then form the basis to impose durational residency requirements for a

virtually limitless set of public goods: e.g., job training; community colleges; minimum wage; tax breaks; child care for working parents; affordable and public housing; and educational reforms like class size reduction. A State could always claim that it feared offering these items to newer citizens, lest they serve as a "magnet" that would induce people to settle in the state, jeopardize the resources available for longer-term residents, and discourage social reforms by the State.

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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